

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

BRISTOL VILLAGE, INC., individually and  
on behalf of a class of others similarly situated,      Court File 1:12-cv-00263-EAW-LGF

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, et  
al.

Defendant.

---

LOUISIANA-PACIFIC CORPORATION,

Third-Party Plaintiff,

v.

CHARLES TRUMP, JR. d/b/a  
NORTHERN ROOFING a/k/a  
NORTHERN ROOFING &  
CONSTRUCTION,  
and JOHN DOES 1 – 10,

Third-Party Defendants.

---

**PLAINTIFF'S REPLY TO DEFENDANT/THIRD-PARTY PLAINTIFF'S RESPONSE  
TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff's Notice of Supplemental Authority, submitted to the Court on March 24, 2015, was limited to the recent decision in *Holbrook v. Louisiana-Pacific Corp.*, No. 12-cv-484 (N.D. Ohio) ("Holbrook Decision"). (Dkt. 117). Defendant's Response goes well beyond that to reargue certain points addressed in its pending motion for summary judgment. (Dkt. 117). This is not the first time Defendant has used this tactic. (see Dkt. 110) Defendant's additional argument is improper and should be stricken, but Plaintiff also notes – should the Court consider the Response – that Defendant fails to demonstrate why the *Holbrook* Decision is irrelevant.

### **DEFENDANT'S EFFORT TO DISTINGUISH THE *HOLBROOK* DECISION IS UNAVAILING**

Defendant suggests that the *Holbrook* Decision should be disregarded by this Court in its determination as to whether the remedy at issue fails of its essential purpose. Defendant claims that this decision is irrelevant since, under New York law, a remedy does not fail its essential purpose unless there is "no remedy at all." This oversimplifies the inquiry and ignores that the inquiry itself is a question for the trier of fact.

The cases cited by Defendant demonstrate that whether a limited-remedy warranty fails of its essential purpose is a question of fact. *See, Maltz v. Union Carbide Chem & Plastics Corp.*, 992 F.Supp. 286, 304 (S.D.N.Y. 1997) ("Generally, whether changed circumstances have caused a limited remedy to fail of its essential purpose is a question of fact and not of law"); *Roneker v. Kenilworth Truck Co.*, 944 F.Supp. 179, 185 (W.D.N.Y. 1996) ("Based on the record before the court, I find that the question of whether the limited remedy of repair or replacement warranted by defendants failed of its essential purpose should be left for the jury to determine "upon proof of the circumstances occurring after the contract [was] formed."); *see also Laidlaw Transportation, Inc. v. Helena Chemical Co.*, 255 A.D.2d 869, 870 (4th Dep't 1998) ("Whether an exclusive or limited remedy provision fails of its essential purpose is an issue of fact for the

jury"). Interestingly, Defendant quotes *Xerox Corp. v. Graphic Mgmt. Servs. INC.*, 959 F. Supp. 2d 311 (W.D.N.Y. 2013) for the principle that a remedy fails its essential purpose "only if it leaves a party 'with no remedy at all,'" but neglects to address that the *very next sentence* in the case is "Generally, this is a question of fact...". *Id.* at 320.

The court in *Xerox* specifically noted that when there are *no allegations* that the limited remedy provision "deprive[s]" a party of an effective remedy, replacement or purchase price may be deemed an appropriate remedy by a court. Here, however, Plaintiff not only alleged that the limited remedy provision deprives it and class members of any meaningful remedy (Complaint ¶¶51-53), it also specifically submitted evidence showing that the provision would result in less than 5% of the true replacement cost for the product. Van Dyck Add. Ex. 12 (Dkt. 98-12).

Defendant also erroneously seeks to distinguish the *Holbrook* Decision based on Ohio's supposed joint inquiry of the doctrines of failure of essential purpose and unconscionability. First, the *Holbrook* court's determination as to whether there was a disputed fact concerning the essential purpose doctrine was not impacted by combining these legal doctrines at any level. Second, under New York law, even if the doctrines are treated as independent inquiries, the Court should still deny the Motion for Summary Judgment based on the factual disputes at issue here. As discussed by Defendant's own authority, even if this Court determines that the bar on consequential damages is not unconscionable, Plaintiff's case may proceed on the question of whether the remedy fails of its essential purpose and any proper damages:

In this court's view, "the precise demarcation between direct and consequential damages is a question of fact ... [which] must be left for resolution at trial." *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F.Supp. 435, 459-60 (S.D.N.Y.1976). In making its determination, the jury should consider the commercial context in which the contract was made as well as the express language of the exclusion clauses themselves. *Id.* at 459.

*Roneker v. Kenworth Truck Co.*, 944 F. Supp. 179, 186 (W.D.N.Y. 1996).

In sum, the *Holbrook* Decision is relevant supplemental authority that supports a denial of Defendant's Motion for Summary Judgment based on the factual disputes in this case.

Dated: April 10, 2015

Cuneo Gilbert & LaDuca, LLP

By: /s/ Michael J. Flannery  
Michael J. Flannery, Esq.  
Cuneo Gilbert & LaDuca, LLP  
7733 Forsyth Boulevard  
Suite 1675  
St. Louis, MO 63105  
Telephone: (314) 226-1015  
[mflannery@cuneolaw.com](mailto:mflannery@cuneolaw.com)

Charles J. LaDuca, Esq.  
8120 Woodmont Avenue  
Suite 810  
Bethesda, MD 20814  
Telephone: 202/789-3960  
[charlesl@cuneolaw.com](mailto:charlesl@cuneolaw.com)

Michael A. Brady  
Edwin P. Hunter  
Hagerty & Brady  
69 Delaware Avenue, Suite 1010  
Buffalo, New York 14202-3875  
Telephone: 716/856-9443  
[mbrady@hagerty-brady.com](mailto:mbrady@hagerty-brady.com)  
[ehunter@hagerty-brady.com](mailto:ehunter@hagerty-brady.com)

Michael McShane, Esq.  
Audet & Partners, LLP  
221 Main Street, Suite 1460  
San Francisco, California 94105  
Telephone: 415/568-2555  
[mmchane@audetlaw.com](mailto:mmchane@audetlaw.com)

Robert K. Shelquist, Esq.  
Lockridge Grindal Nauen P.L.L.P.  
100 Washington Ave. S, Suite 2200

Minneapolis, Minnesota 55401  
Telephone: 612/339-6900  
[rkshelquist@locklaw.com](mailto:rkshelquist@locklaw.com)

Shanon Carson, Esq.  
Berger & Montague PC  
1622 Locust Street  
Philadelphia, Pennsylvania 19103  
Telephone: 215/875-3000  
[scarson@bm.net](mailto:scarson@bm.net)

Charles Schaffer, Esq.  
Levin Fishbein Sedran & Berman  
510 Walnut Street, Suite 500  
Philadelphia, Pennsylvania 19106  
Telephone: 215/592-1500  
[cschaffer@lfsblaw.com](mailto:cschaffer@lfsblaw.com)

*Attorneys for Plaintiff and the Proposed Class*

## **CERTIFICATE OF SERVICE**

This document was filed electronically on April 10, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and parties may access this filing through the Court's system.

*/s/ Michael J. Flannery*  
Michael J. Flannery